IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 24969 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GREENGOLD TIMBER PRIVATE LIMITED. - Petitioner(s)
Versus
SHIPRA OCEAN TRADE PVT LTD. - Respondent(s)

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Appearance :
MRS KETTY A MEHTA for Petitioner(s) : 1,
MR CL SONI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 07/05/2007

ORAL JUDGMENT

1. The petitioner-original defendant is before this Court being aggrieved by order dated 16.10.2006 passed by the learned Additional Senior Civil Judge, Gandhidham below Exhibits 15 and 18 in Special Civil Suit No. 19 of 2003.

It is prayed that the said order be modified and the present petitioner-defendant be permitted to defend the suit unconditionally and the condition of furnishing bank guarantee of Rs.60 lakhs be quashed and set aside.

2. The matter was argued by the learned senior counsel for the petitioner Mrs. Ketty A. Mehta, who did not point out that the order under challenge is passed after the matter was remanded by this Court. The learned advocate Mr. Soni for the respondent-original plaintiff pointed out to this Court that earlier the respondent herein had approached this Court by Special Civil Application No. 17851 of 2005 and, by order dated 12.7.2006 (Coram: Hon'ble Mr. Justice A.M. Kapadia), the matter was remanded. Learned advocate Mr. Soni invited attention of the Court to the relevant observations made by this Court in order dated 12.07.2006.

Operative part of the order reads as under:

> “12. For the foregoing reasons, the petition is allowed with no order as to costs. The impugned order dated 26.07.2005 passed by the learned Additional Senior Civil Judge, Gandhidham, Kachchh, below application Ex.18 is hereby quashed and set aside and **the matter is remanded to the learned trial Judge for deciding the application Ex.15 summons for judgment filed by**

the plaintiff and the application Ex.18 filed by the defendant seeking unconditional leave to defend the suit afresh, after giving ample opportunity to both the parties."

3. The property demands that the learned senior counsel for the petitioner ought to have invited attention of the Court to this important aspect of the matter. For the reasons best known to the learned senior counsel, she did not invite attention of the Court to this particular aspect of the matter.

4. Learned advocate for the respondent Mr. Soni invited attention of the Court to the other observations made by this Court in its order dated 12.07.2006 in paragraphs 6, 7, 9 and 10, the same are reproduced hereunder for ready reference:

> "6. Mr. CL Soni, learned advocate of the plaintiff, submitted that the order granting unconditional leave to defend the suit is an unreasoned order. He also submitted that though the plaintiff has produced High Sea Sales bills issued by the plaintiff to the defendant and High Sea Purchase Letters addressed by the defendant to the Assistant Commissioner of Customs, Custom House, Kandla declaring that it has purchased the goods in the consignments from the plaintiff, the learned trial Judge has considered only the books of accounts and jumped to the conclusion that since the entries in the

ledger produced by the plaintiff have no evidentiary value, there is a triable issue between the parties and, therefore, the defendant is entitled to unconditional leave to defend the suit. Mr. Soni, learned advocate of the plaintiff has also asserted that the defendant has made total denial about the purchase of goods by it from the plaintiff though it has confirmed the purchase of goods from the plaintiff in the letters written to the Assistant Commissioner of Customs. Therefore, according to Mr.Soni, learned advocate of the plaintiff, the learned trial Judge has failed to exercise the jurisdiction vested in him and, therefore, it has resulted in miscarriage of justice and since the learned trial Judge has committed jurisdictional error, this court can correct it in exercise of the powers conferred under Article 227 of the Constitution. He, therefore, urged to allow the petition by quashing and setting aside the impugned order passed by the learned trial Judge.

7. Per contra, Mr. Nalin Thakkar, learned advocate of the defendant, has supported the order passed by the learned trial Judge granting unconditional leave to defend the suit. Mr. Thakkar has submitted that the defendant has raised triable issues in the application for leave to defend the suit. Mr. Thakkar also submitted that the suit filed by the plaintiff

under Order 37 of the Code is not maintainable. Therefore, the learned trial Judge was right in granting unconditional leave to defend the suit filed by the plaintiff. He, therefore, urged to dismiss the petition.

9. There is no manner of doubt that the summary suit filed by the plaintiff under Order 37 of the Code is maintainable in view of clause (b) of sub-rule (2) of Rule (1) of Order 37 as the plaintiff has asked the liquidated demand in money payable by the defendant with interest. The plaintiff and defendant both are merchants dealing in timber and the plaintiff has supplied the goods to the defendant. The defendant has made total denial of the purchase of the goods from the plaintiff. However, it has confirmed the purchase of goods from the plaintiff in the letters written to the Assistant Commissioner of Customs. Though the said document is produced before the trial court by the plaintiff, the learned trial Judge has not considered the said document.

10. Besides this, the learned trial Judge has also not recorded any categorical finding as to whether the defence raised by the defendant is sham, bogus or moonshine or it is genuine. Without appreciating the fact that no arbitration agreement between the parties is produced on record, the learned trial Judge has

observed that if there is any agreement between the parties then the defendant can establish it by producing primary or secondary evidence. Therefore, the learned trial Judge was carried away by the submission advanced by the learned advocate of the defendant that there is an arbitration agreement between the parties without there-being any arbitration agreement on record. Moreover, the order passed by the learned trial Judge is a cryptic and unreasoned one which cannot be sustained in the eye of law. It is settled principle of law that while deciding the application taken out by the plaintiff for summons for judgment and the application filed by defendant seeking unconditional leave to defend the suit, the learned trial Judge has to record a categorical finding as to whether the claim put forward by the plaintiff is genuine or not and whether the defence raised by the defendant is genuine or it is bogus, sham or moonshine. Without recording such a finding, the learned trial Judge has allowed the application seeking unconditional leave to defend the suit in favour of the defendant and thereby granted unconditional leave to the defend the suit."

5. After the matter was argued, the learned Judge considered both the applications, Exh.15 and Exh.18 in Special Civil Suit No.19 of 2003, and decided the same by order dated 16.10.2006, which is under

challenge in this petition.

Operative part of the order reads as under:

> "An application for leave to defend is allowed. An application for passing of judgment straightway is disallowed.
> **The defendant is hereby permitted to defend the suit subject to producing Bank guarantee of Rs.60 lacs before the court.**"

The learned advocate for the petitioner vehemently submitted that the suit filed by the respondent herein-original plaintiff does not fulfill the necessary requirement, to be tried as 'summary suit' and for that, she invited attention of the Court to the provisions of Order 37 Rule 1 and 2 of the Code of Civil Procedure.

> "**1. Court and classes of suits to which the Order is to apply**.-(1) This Order shall apply to the following Courts, namely:-
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> (a) High Courts, City Civil Courts and Courts of Small Causes; and
> (b) other Courts:
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> Provided that in respect of Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to

such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits; namely:-

(a) suits upon bills of exchange, hundies and promissory notes;
(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract, or
(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

The learned senior counsel submitted that clause (b) of Rule 2 of Order 37 provides that 'suit can

be tried as summary suit only if it is based on written contract or on an enactment....'. She submitted that in the present case, written contract is not produced by the plaintiff. An application, being Exh.22, was filed, a copy of which is produced at Annexure-'H' collectively (page No.84). It is dated 23.09.2003 the prayer para 5 reads as under:

> “It is prayed that the plaintiff be ordered to produce all the original High Sea Sale Agreement executed by and between the parties. It is submitted that each and very such agreement contains the same and such Arbitration Clause.”

The learned senior counsel for the petitioner tried to create an impression that, 'the plaintiff is a dishonest person, is deliberately keeping back the contract and is trying to snatch an order from the Court suppressing material information, which is otherwise required to be given to the Court in the form of written agreement/ contract'.

The learned advocate Mr. Soni for the respondent-original plaintiff pointed out that, 'the original contract was in custody of the defendant as the defendant was required to produce the same before the Customs authority for getting the goods'. Not only that, later on, this agreement is produced by the petitioner at page 123 with Exh. No.30- List of Documents. Mark 30/1 is a copy of High Seas Sale Agreement. This conduct of the petitioner speaks

for itself and makes his intentions clear that in fact, it is he who wanted to steal an order from the Court.

6. Only on this short ground, this petition deserves to be dismissed. But, then, it would be contended that the Court did not apply its mind to the merits of the case, the Court restrained itself from dismissing the petition on this ground. Even on merits, the Court finds no flaw in order under challenge.

7. The learned advocate for the petitioner argued almost all possible points, like: the case is filed on the basis of the 'books of account', which are in the nature of ledger and ledger cannot be said to be a 'books of account' as contemplated under Order 37 of the Code of Civil Procedure and, therefore, the suit cannot be tried as summary suit and is liable to be dismissed, if not, is required to be ordered to be tried as regular suit by granting unconditional leave to defend to the petitioner- original defendant. The learned advocate relied upon the following authorities :

1. 1998 SC 2317 in the matter of M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank
2. 2006 (8) SCC 25 in the matter of Defiance Knitting Industries (P) Ltd. Vs. Jay Arts
3. 1991 Madras 274 in the matter of Ramalingam

Vs. Basavalingam, which later on the learned advocate agreed not to rely upon as Madras judgment is relied in 1997 SC

4. 1985 GLH (U.J.) 2 in the matter of P.P. Prajapati Vs. M.s, Jagdish Timber Mart & Others.
5. 1981 Bombay 446 in the matter of Zenna Sorabji & others Vs. Mirabelle Hotel Co. (Pvt.) Ltd. & Ors.
6. 1982 Calcutta 386

Every attempt was made by the learned senior counsel for the petitioner to convince this Court that the learned Judge has erred in passing the impugned order, as the Court has allowed the defendant to defend the suit subject to producing Bank guarantee of Rs.60 lakhs before the Court.

With pains, it is reiterated that the learned counsel for the petitioner did not point out that the impugned order was passed after the matter was remanded by this Court, with certain observations with a view that the learned Judge decides Exh. 15 and Exh.18 afresh and while doing so, he was duty bound to take into consideration the observations made by this Court.

8. Present is the petition under Article 227 of the Constitution of India, wherein legality and validity of an order is to be examined. The learned Judge after taking into consideration the

observations made by this Court, passed the order under challenge. In considered opinion of this Court, there is no flaw in the order, as the same is passed after taking into consideration the observations made by this Court in its order dated 12.07.2006.

9. The decision of the Hon'ble the Apex Court in the matter of **M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank** reported in **AIR 1998 SC 2317**, is directly applicable to the facts of the case on hand. There, the Hon'ble the Apex Court has summarized the law on the point in para 4 and, for ready perusal, para 4 is reproduced hereunder:

> "4. The position in law has been explained by this Court in Santosh Kumar v. Mool Singh, (1958) SCR 1211 : (AIR 1958 SC 321); Milkiram (India) Private Ltd. v. Chaman Lal Bros. AIR 1965 SC 1698 and Michalec Eng. and Mfg. v. Basic Equipment Corporation, AIR 1977 SC 577. The propositions laid down in these decisions may be summed up as follows :-
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> (a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide

or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or more of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

In fact in identical matters on the file of the said High Court in summary suit No. 2963 of 1990 Dena Bank v. M/s. Sunil Enterprises and summary suit No. 1153 of 1989 Bank of India v. Mahendra Sarabhai Choksi, leave to defend had been granted to defendants.”

10. The learned advocate for the petitioner vehemently submitted that the present case falls under Clause (B) as, according to her, 'the petitioner-original defendant has raised a triable issue indicating that he has a fair and bonafide or reasonable defence'. In this regard, the learned senior counsel repeatedly relied upon and invited attention of the Court to two paragraphs, i.e. paragraph 6 and paragraph 10 of the order under challenge, which read as under:

> “6. Now looking to the facts of defendant's his case shows that there is triable issue involved in present case.”

Para 10 reads as under:

> “10. .....So, I am of the view that present suit involves a triable issue.”

Learned advocate Mr. Soni rightly pointed out that these two paragraphs cannot be read without proper reference to context, more particularly when the learned senior counsel for the petitioner did not point out to this Court that the matter was under consideration of the learned Judge after it was remanded by this Court. He submitted that the order was passed in compliance of the observations made by this Court.

11. Learned advocate Mr. Soni rightly invited attention of the Court to Clause (E) of para 4 of the aforesaid judgment, which reads as under:

> "(E) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove defence."

But, at the same time, protect the plaintiff imposing condition that the amount claimed should be paid into Court or otherwise secured.

The order under challenge in this petition falls in this Clause (E) and it satisfies the aforesaid observations of the Hon'ble the Apex Court.

12. On perusal of order under challenge dated 16.10.2006, this Court finds that the learned Judge has struck a balance between the parties and has divided the claim in two parts. For one part of the claim, he found that there is a triable issue, whereas the part of the claim in his option is such, for which no defence is available with the defendant. Therefore, the learned Judge has rightly protected

the interest of the plaintiff by permitting, 'the defendant to defend the suit on his producing a bank guarantee of Rs. 60 lakhs before the Court'.

13. This Court is of the opinion that the learned Judge has not committed any error, which warrants interference at the hands of this Court. Hence, this petition fails. In view of the observations made hereinabove, the petition is dismissed with cost of Rs.7,500/- (Rupees Seven Thousand Five Hundred only). Notice is discharged. Interim relief granted earlier is vacated.

14. At this juncture, learned advocate for the petitioner requests that this order be stayed for a period of eight weeks in order to approach the Hon'ble the Supreme Court.

As this Court has found no substance in the matter and in view of the observations made by this Court about the conduct of the petitioner before this Court, this Court is of the opinion that it will be a miscarriage of justice if the petitioner is granted the stay and hence, the request is rejected.

(RAVI R. TRIPATHI, J.)

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